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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 793.

L. P. STEUART & BRO., INC., *Petitioner,*

v.

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR THE PETITIONER.

OPINIONS BELOW.

The opinion of the United States Court of Appeals is not yet reported but is set forth on Pages 66-71 of the record. The opinion of the District Court is not reported, but appears on Pages 59-62 of the record.

JURISDICTION.

The judgment of the United States Court of Appeals was entered on February 18, 1944 (R. 71). The petition for a writ of certiorari was granted on April 3, 1944. The jurisdiction of this Court rests on Section 240 of the Judicial Code, as amended by Act of February 13, 1925; U. S. C. A. Title 28, Section 347 (a).

QUESTION PRESENTED.

Does the Office of Price Administration have statutory authority under Title III of the Second War Powers Act to entertain suspension order proceedings prescribed by Procedural Regulation 4 of that office, and to issue suspension orders prescribed by that Regulation, that is to say orders which regulate or prohibit, for a period, the sale, transfer, delivery or other disposition or the acquisition or use of commodities or facilities, and which are issued against a person who has acted in violation of a rationing order or regulation?

STATUTE INVOLVED.

Title III of the Second War Powers Act is set forth at length in the Appendix, *infra*, Page 40.

The provisions primarily involved are:

> "(2) • • • Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense."
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> "(5) Any person who willfully performs any act prohibited or willfully fails to perform any act required by, any provision of this subsection (a) or any

rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than one year, or both.

"(6) The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States and the courts of the Philippine Islands shall have jurisdiction of violations of this subsection (a) or any rule, regulation, or order or subpena thereunder, whether heretofore or hereafter issued, and of all civil actions under this subsection (a) to enforce any liability or duty created by, or to enjoin any violation of, this subsection (a) or any rule, regulation, order, or subpena thereunder whether heretofore or hereafter issued. Any criminal proceeding on account of any such violation may be brought in any district in which any act, failure to act, or transaction constituting the violation occurred. Any such civil action may be brought in any such district or in the district in which the defendant resides or transacts business. Process in such cases, criminal or civil, may be served in any district wherein the defendant resides or transacts business or wherever the defendant may be found; and subpena for witnesses who are required to attend a court in any district in any such case may run into any other district. No costs shall be assessed against the United States in any proceeding under this subsection (a).

* * * * * * * * *

"(8) The President may exercise any power, authority, or discretion conferred on him by this subsection (a), through such department, agency, or officer of the Government as he may direct and in conformity with any rules or regulations which he may prescribe."

STATEMENT.

Petitioner, a retail fuel oil dealer, filed a complaint in the District Court of the United States for the District of Columbia (R. 1) seeking to enjoin the enforcement of a "suspension order" issued by the Office of Price Administration. Appropriate motions were filed for a temporary re-

straining order and for a preliminary injunction. A temporary restraining order (R. 53) was issued by consent and from time to time has been extended; and is now in effect.

The judgment of the District Court (R. 62) dismissed the complaint and the judgment of the Court of Appeals affirmed that of the District Court (R. 71). As recited in the judgment of the District Court, there were no material issues of fact.

Petitioner for many years has been engaged in the retailing of fuel oil (R. 2). In the course of its fuel oil business, it has invested approximately $750,000.00 in the various facilities necessary to the conduct of such a business. In compliance with recommendations of the Petroleum Administrator for War, it expended $50,000 to increase its storage, unloading and delivery facilities. Due to this fact and to the failure of its competitors so to do, Petitioner is better able to serve the retail purchasing public including the Government than are its competitors (R. 2).

By Executive Order 9125 (7 Fed. Reg. 2719-2720), the President conferred his power under Section 2 (a) (2) of Title III of the Second War Powers Act on the War Production Board and confirmed War Production Board Directive No. 1 (7 Fed. Reg. 562) which lodged in the Office of Price Administration certain of the Board's allocation power under the earlier acts. By Supplementary Directive 1-0, the War Production Board delegated to the Office of Price Administration specific authority over the rationing of fuel oil (7 Fed. Reg. 9418). Although the point was made and stressed below that the suspension order here in question was invalid because it exceeded the authority of the Office of Price Administration under War Production Board Directive 1 and 1-0, certiorari was not requested on that question. At this stage of the case, it is assumed that the President has delegated to the Office of Price Administration whatever authority he has under Title III of the Second War Powers Act.

In February of 1943, the Office of Price Administration issued Procedural Regulation 4 (8 Fed. Reg. 1744). This Regulation is set forth at length in Pages 18-22, inclusive, of the Record. The Regulation prescribes the procedure to be followed in issuing suspension orders (Section 1300.151, R. 14). A suspension order is defined by Section 1300.180(f) (R. 22) as follows:

> "'Suspenion order' means an order which regulates or prohibits, for a period, the sale, transfer, delivery or other disposition or the acquisition or use of commodities or facilities, *and which is issued against a person who has acted in violation of a rationing order or regulation.*" (Italics supplied.)

The Regulation provides for the manner of instituting proceedings, Section 1300.152 (R. 14), a statement of charges and notice of hearing, Section 1300.153 (R. 14), a Hearing Commissioner, Section 1300.154 (R. 14), conduct of hearings, right of respondents to counsel, and rules of evidence, Section 1300.156 (R. 15), subpoenas, Section 1300.157 (R. 15), witnesses, Section 1300.158 (R. 16), contempt, Section 1300.159 (R. 16), briefs, Section 1300.163 (R. 17), orders of Hearing Commissioners, Section 1300.165 (R. 17), and appeals to the Hearing Administrator, Section 1300.170-1300.175 (R. 19-20). Section 1300.165 (R. 17) provides for a determination by a Hearing Commissioner that the respondent *has violated* a ration regulation before he issues a suspension order, and provides that he shall make written findings of fact and conclusions of law.

In October, 1942, the Office of Price Administration issued Ration Order 11 (7 Fed. Reg. 8480) which deals with the marketing and use of fuel oil.

Pursuant to the provisions of Procedural Regulation 4, suspension order proceedings were instituted against Petitioner in August, 1943, (R. 3). The specification of charges (R. 24) alleges 227 violations of Ration Order No. 11, which were grouped by both the Hearing Commissioner and the Hearing Administrator as follows (R. 32, R. 43):

1. The purchase of fuel oil without transferring rationing evidence. (187 of the alleged violations related to daily purchases falling in this group. R. 25)

2. The sale of fuel oil without requiring the delivery of valid ration evidence.

3. The failure to comply with the requirements of the regulation with respect to the keeping of records.

The alleged violations occurred during the period from November 3, 1942, to June 2, 1943. The Hearing Commissioner sustained some of the charges and found Petitioner was not guilty as to others (R. 32-39). On appeal, the Hearing Administrator found Petitioner guilty of all of the charges (R. 41 *et seq.*), and at the conclusion of his opinion entered the following order (R. 50-51) (Petitioner was referred to as "Respondent" in the order):

> "A. From January 15, 1944 to December 31, 1944, both dates inclusive, respondent shall not, directly or indirectly, receive delivery of fuel oil for resale or transfer to any consumer, nor shall respondent transfer fuel oil to any consumer, provided that (1) if respondent on or before January 10, 1944 delivers to the District Enforcement Attorney of the District of Columbia District Office a duly verified list of the names and addresses of all consumers to whom respondent sold and delivered fuel oil from October 21, 1941 through October 21, 1942, and (2) if respondent surrenders to the District of Columbia District Office before January 15, 1944 all void or expired ration evidences (or delivery receipts) then in its possession, then and in that event respondent may from January 15, 1944 to December 31, 1944, both dates inclusive, transfer fuel oil to any consumer to whom it transferred fuel oil between October 21, 1941 through October 21, 1942, both dates inclusive, and may receive deliveries of sufficient quantities of fuel oil for purposes of resale and transfer to such consumers.

"B. Within thirty (30) days after the receipt of a copy of this order, respondent shall render an accounting to the Director of the District of Columbia District Office (1) for all fuel oil transferred or received by the respondent during the period from 12:01 a. m., October 22, 1942, to the date of such accounting, (2) for all coupons, ration evidences (or delivery receipts) received by or surrendered by the respondent during said period, and (3) showing the quantity of fuel oil (by physical inventory), and coupons, ration evidences (or delivery receipts), on hand and on deposit in its ration bank account as of the date of said accounting.

"C. If at any time during the period of this suspension the Petroleum Administrator for War or his duly authorized agent certifies to the Director of the District of Columbia District Office that the fuel oil needs of the District of Columbia or the area served by respondent cannot be met by the supplies and facilities of other suppliers and dealers in this area in addition to those of respondent's as herein restricted, and that it is, therefore, essential to the welfare of the community that the provisions of this order should be modified, and the District Director joins with respondent in a petition requesting such modification, an order of modification may be entered either by the Chief Hearing Commissioner of Region II or the Hearing Commissioner who heard the case below removing the restrictions herein imposed to the extent such action is shown to be necessary to the welfare of the community or the war effort.

"D. Any terms used in this suspension order that are defined in Ration Order No. 11, shall have the meaning therein given to them."

If the suspension order is enforced, Petitioner will suffer irreparable damage. There is an annual turnover of fifteen to twenty per cent in its customers (R. 10). Petitioner therefore will not be able to sell the amount of oil to the number of customers to whom it sold in the year October 21, 1941-October 21, 1942 (hereinafter sometimes referred to as the "prerationing year"), but will be able to supply

only a part of them (R. 10). A large percentage of Petitioner's sales has been for cash. During the pre-rationing year no records were kept, or required to be kept, which would show who these cash customers were. Consequently, Petitioner does not know who all of its customers in the pre-ration year were, and a large number of persons who were such customers at that time will be lost. The expenditure for storage and handling of fuel oil made pursuant to the recommendations of the Petroleum Administrator for War will be wasted and of no benefit to the War effort if the suspension order is enforced. During the last few days prior to the filing of the complaint, the Government purchased 250,000 gallons of fuel oil from the plaintiff. By reason of the fact that the Government was not a customer of Petitioner in the pre-rationing year, Petitioner will not be able to supply the Government if the order is enforced.

Paragraph 7 of the Complaint (R. 6-8) sets forth Petitioner's charge of the invalidity of the suspension order proceedings and of the suspension order itself. The claim is there made that the suspension order hearings and the suspension order are not authorized by any statute or valid executive order, proclamation or regulation. The claim is also made that Title III of the Second War Powers Act provides the exclusive remedies for the enforcement of Petitioner's duties created by the said statute or by any rule, regulation or order therein; and that if the suspension order is enforced, Petitioner will have been penalized for alleged violations of regulations of the Office of Price Administration issued pursuant to the Second War Powers Act, without proceedings having been brought in the District Court of the United States and without Petitioner's having been found guilty by any such court.

The answer of the Respondents claimed that the suspension order was a valid exercise of the allocation power granted to the President of the United States by Title III of the Second War Powers Act of 1942 (56 Stat. 176) 50 U.S.C. App. Sec. 633, and delegated to the Office of Price Administration. (R. 57).

SPECIFICATION OF ERROR.

The United States Court of Appeals for the District of Columbia erred in holding that the Office of Price Administration has authority under Title III of the Second War Powers Act to entertain suspension order proceedings prescribed by Procedural Regulation 4 of that office and to issue suspension orders prescribed by that regulation, that is, orders which regulate or prohibit the sale, transfer, delivery, or other disposition, or the acquisition or use of commodities or facilities, and which are issued against a person who has acted in violation of a rationing order or regulation.

SUMMARY OF ARGUMENT.

The statute in question contains no express authority to withhold rationed commodities from a person merely because that person has violated a regulation. The statute provides for methods of enforcement, and its silence as to other methods indicates that no other methods were authorized.

The suspension orders prescribed by Procedural Regulation 4 are penal in character. Therefore, statutory authority for their issuance cannot be left to implication, but must be clearly expressed.

The penal characteristics of the suspension orders, and the consequences of these characteristics, are not avoided by terming dealers in rationed commodities "agents," "licensees," or "quasi-licensees." They are in fact neither agents nor licensees nor quasi-licensees. Even if they are, authority is not given to terminate their rights by way of punishment for past misdeeds.

The omission in the statute of authority to issue suspension orders has not been supplied by notice or ratification of administrative interpretations.

ARGUMENT.

I.

The Statute Contains No Express Authority to Withhold Rationed Commodities for Previous Violations, But Does Provide Other Remedies and Means of Enforcement.

Section 2(a)(5) of the Act, provides that for wilful violations of the Act itself or regulations thereunder the violator shall be guilty of a misdemeanor and be fined not more than $10,000 or imprisoned for not more than a year. Section 2(a)(6), gives the District Courts jurisdiction of violations of the subsection or of any rule thereunder and of *all* civil actions to enforce any liability or duty or to enjoin any violation of the Act or any regulation thereunder. Section (2)(a)(6) likewise gives the District Courts power to enjoin violations.

It is realized that the rule that provision for certain means of enforcement and omission of others implies that the omission of the other means of enforcement was deliberate is only a rule of construction, and is not conclusive. However, the fact that Section 2(a)(6) gives the District Courts jurisdiction of "*all* civil actions" to enforce both the statute and the regulations cannot be ignored.

Further, the fact that Congress has fixed a limit on the extent of criminal punishment cannot be disregarded when it is realized that under Procedural Regulation 4, suspension orders which may be much more drastic in effect are provided for, *infra*, 18-19. Again, the Courts are given power to enjoin violations of regulations. Congress presumably intended, however, that this power should not be unlimited but should be subject to the well-known rules of equity concerning the issuance of an injunction. Compare *Hecht Company* v. *Bowles*, ... U. S. ...., unreported. As noted, *infra*, 18-19, Procedural Regulation 4 requires no finding by a Hearing Commissioner as to whether a violation is apt to be repeated or whether future violations are

threatened. Moreover, Congress thought it necessary in this Act expressly to give to the Courts authority merely to enjoin future violations. This Court is asked by the Respondents here to hold that the power to end altogether an offender's business or trading may be implied.

Aside from the suspension orders now being issued under the purported authority of the Act by the Office of Price Administration, the War Production Board, and the Office of Defense Transportation, no instances can be found of suspension orders of the type here in question, issued by administrative officers, where statutory authority therefor does not clearly appear. Where administrative penalties or "suspension orders" have been authorized, Congress has uniformly provided in detail the grounds upon which they should issue, the limits of the suspension order, and the extent of judicial review. No such provisions are found here. When Congress has limited the criminal penalty for a violation of the statute or regulations thereunder to $10,000 or one year in jail, can it be said that it authorized by implication an economic death sentence? Had the authority to issue suspension orders for past violations been requested, Congress would have granted such authority, if at all, only upon surrounding the granted power with limitations and safeguards.

The Respondents cite as authority to issue suspension orders the provision of Section 2(a)(2) of the Act, which provides that the President may "allocate" materials. We have, therefore, one of those problems in the reading of the statute wherein meaning is sought to be derived not from specific language but out of the innuendos of a portion of it. "At best, this is a subtle business, calling for great wariness, lest what professes to be mere rendering becomes creation, and attempted interpretation of legislation becomes legislation itself." Compare *Palmer* v. *Massachusetts*, 308 U. S. 79, 83.

II.

The Suspension Order Prescribed by Procedural Regulation 4 and Issued in This Case was Penal in Nature, and the Power to Issue It is Therefore Not to be Implied.

Purpose of Inquiry and Meaning to be Ascribed to the Term "Penalty" for the Purpose of this Case.

In determining whether authority has been given by Congress to issue suspension orders based upon past violations of the regulations, we must look for an implied power. Admittedly, no express power has been given in the statute. If the suspension orders are penalties or are substantially penalties the right to issue them will not be readily implied. On the contrary, a person may not be subjected to them unless the words of the statute plainly impose them. *Keppel* v. *Tiffin Savings Bank*, 197 U. S. 356, 362; *Tiffany* v. *National Bank of Missouri*, 18 Wall. 409, 410. See *B. Simon Hardware Co.* v. *Nelson*, 52 F. Supp. 474, in which Mr. Justice Bailey, who decided the instant case, held that the statute in question does not grant the power to issue suspension orders as a penalty. Therefore, the answer to the question as to whether the suspension order prescribed by Procedural Regulation 4 is a penalty determines the answer to the question as to whether authority to issue such suspension orders was given.

The Court below did not determine whether Congress conferred penal authority. Instead, it held that the suspension order in this case was not penal. (R. 69.)

In answering the question as to whether suspension orders are penalties, care is to be exercised in determining the meaning to be ascribed to the terms "penal" and "penalty." As said in *Life and Casualty Co.* v. *Barefield*, 291 U. S. 566, 574, "'Penalty' is a term of varying and uncertain meaning." It comprehends all forms of criminal punishment, including capital punishment. See *United States* v. *Reisinger*, 128 U. S. 398, 402. It also includes the "fair price of the adventure" of defending and losing a lawsuit.

Life and Casualty Co. v. *Barefield, supra.* The meaning to be ascribed to the term depends on whether it is used in a strict or broad sense and on the consequences which follow from its use. As said in *Huntington* v. *Attrill*, 146 U. S. 657, 666-667:

> "In the municipal law of England and America, the words 'penal' and 'penalty' have been used in various senses. Strictly and primarily, they denote punishment, whether corporal or pecuniary, imposed and enforced by the State, for a crime or offence against its laws. *United States* v. *Reisinger*, 128 U. S. 398, 402; *United States* v. *Chouteau*, 102 U. S. 603, 611. But they are also commonly used as including any extraordinary liability to which the law subjects a wrongdoer in favor of the person wronged, not limited to the damages suffered. They are so elastic in meaning as even to be familiarly applied to cases of private contracts, wholly independent of statutes, as when we speak of the 'penal sum' or 'penalty' of a bond. In the words of Chief Justice Marshall: 'In general, a sum of money in gross, to be paid for the non-performance of an agreement, is considered as a penalty, the legal operation of which is to cover the damages which the party, in whose favor the stipulation is made, may have sustained from the breach of contract by the opposite party.' *Tayloe* v. *Sandiford*, 7 Wheat. 13, 17.
>
> "Penal laws, strictly and properly, are those imposing punishment for an offence committed against the State, and which, by the English and American constitutions, the executive of the State has the power to pardon. Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal.
>
> "The action of an owner of property against the hundred to recover damages caused by a mob was said by Justices Willes and Buller to be 'penal against the hundred, but certainly remedial as to the sufferer.' *Hyde* v. *Cogan*, 2 Doug. 699, 705, 706. A statute giving the right to recover back money lost at gaming, and, if the loser does not sue within a certain time,

> authorizing a *qui tam* action to be brought by any other person for threefold the amount, has been held to be remedial as to the loser, though penal as regards the suit by a common informer * * *."

In that case this Court held that the same liability imposed by statute might not only be considered as penal in one sense of the term and not penal in another, but held that an action or liability could be penal as to the person on whom the liability is imposed and remedial as to the one who recovers upon it. There a judgment was recovered in New York against an officer of a corporation under a New York statute which imposed on the officers and directors of a corporation a personal liability for its debts if they filed false statements as to its condition. Suit was brought on the judgment in Maryland. The Court of Appeals of Maryland refused to enforce the judgment on the ground that it was a penalty. In determining that the New York judgment was not a penalty in its sense that it should be denied full faith and credit, this Court, after distinguishing the different senses in which the terms "penal" and "penalty" are used, said at Page 676:

> "* * * As the statute imposes a burdensome liability on the officers for their wrongful act, it may well be considered penal, in the sense that it should be strictly construed. But as it gives a civil remedy, at the private suit of the creditor only, and measured by the amount of his debt, it is as to him clearly remedial. * * *"

The statement of the Court of Appeals (R. 70) that

> "the fact that the suspension order protects the public directly, by allocating oil away from a dealer who was disposed to violate the rationing program and towards other dealers, sharply distinguishes it from fines and penalties"

discloses that that Court considered the terms "penal" and "penalty" in their narrowest sense. In so doing and in

bolstering its conclusion with the decisions cited by it,[1] it failed to apprehend the sense in which the term "penalty" is employed in the rule that penalties will not be readily implied and that a person will not be subjected to them unless the words of the statute plainly impose them.

Thus, in *Hawker* v. *New York*, 170 U. S. 189, relied upon by the Court of Appeals, the question was whether a statute making it a crime for one to practice medicine who had been convicted of a felony was *ex post facto* as to one who had theretofore been so convicted. The rule was well established both before and after *Hawker* v. *New York*, *supra*, that the *ex post facto* prohibition in the Constitution relates only to criminal punishment. *Johannessen* v. *United States*, 225 U. S. 227, 242; *Calder* v. *Bull*, 3 Dall. 386.

A loss or a liability may be penal in character or a penalty without being criminal. This Court has often upheld the constitutional validity of statutes and decisions providing for and assessing penalties without a jury, penalties assessed by a civil proceeding after a criminal adjudication, and penalties sustained only by a preponderance of the evidence. See *Helvering* v. *Mitchell*, 303 U. S. 391. There Mr. Justice Brandeis, particularly in the footnotes, points out the distinction between penalties of such a criminal nature as to fall within the purview of one or more of the constitutional requirements, such as the right to jury trial and proof beyond a reasonable doubt, and "remedial sanctions." He has made it plain that the fact that a liability is in the nature of a "sanction", does not necessarily make it a *criminal* penalty. Therefore, even if *Hawker* v. *New York* were in other respects analogous, the fact that it held the statute not to be *ex post facto*, does not make it authority for the proposition that a suspension order is not sufficiently penal to require plain statutory authorization.

The same criticism is applicable to the citation of *Nelson*

[1] *Hawker* v. *New York*, 170 U. S. 189; *Nelson* v. *Secretary of Agriculture*, 133 F. 2d 453 (C. C. A. 7th); *Wright* v. *Securities & Exchange Commission*, 112 F. 2d 89 (C. C. A. 2d); *Nichols* v. *Secretary of Agriculture*, 131 F. 2d 651 (C. C. A. 1st).

v. *Secretary of Agriculture*, 133 F. 2d 453 (C. C. A. 7th). In that case the question was whether or not Section 6 (b) of the Commodities Exchange Act was constitutional. It was contended there that the section was unconstitutional because the charge and order were criminal in character, and that to give such force to the Commodities Exchange Act was to work a delegation of judicial functions and to violate Sections 1 and 2 of Article III of the Constitution and the Fifth and Sixth Amendments. All that was held was that the order was remedial to the extent that it was not criminal. It is plain that the Court there used "penal" in the same sense as "criminal."

Likewise, in *Wright* v. *Securities and Exchange Commission*, 112 F. 2d 89 (C. C. A. 2d) the point was made that the suspension order involved was a penalty as a basis for the contention that a violation must be proved beyond a reasonable doubt. However, there again the question must have been whether the penalty was a criminal one; for this Court has long held that a penalty assessed in a civil action or by an administrative officer need not be proved beyond a reasonable doubt. *United States* v. *Regan*, 232 U. S. 37; *Lloyd Sabaudo Societa* v. *Elting*, 287 U. S. 329. See *Oceanic Navigation Company* v. *Stranahan*, 214 U. S. 320, 337-338. In *Lloyd Sabaudo Societa* v. *Elting* this Court held, as in *Wright* v. *Securities and Exchange Commission*, *supra*, that if there is some evidence to support the findings of the administrative officer, his ruling could not be disturbed.

The terms "penal" and "penalty" were not used in *Nichols* v. *Secretary of Agriculture*, 131 F. 2d 651 (C. C. A. 1st). All that was determined was that the suspension power there in question was not *primarily* punishment for a past offense but a necessary power clearly given to the Secretary of Agriculture. It is to be noted that in that case as in *Wright* v. *Securities & Exchange Commission*, *supra*, and *Nelson* v. *Secretary of Agriculture*, *supra*, the statute clearly and unmistakably gave to the administrative officers the power to issue the orders. The question as to

whether the orders had a sufficiently penal character that they must have been expressly provided for by the statute was not present in any of the decisions.

The decision of the Court of Appeals that the suspension order in this case was not a penalty, is, therefore, unsupported by any decision refusing to classify a suspension order as a penalty where the question of the existence of statutory authorization is presented. It is proposed, therefore, to analyze the nature of the suspension order prescribed by Procedural Regulation 4 and to demonstrate that it is penal to the extent that clear statutory authority must be found for it.

Penal Characteristics of the Suspension Order Prescribed by Procedural Regulation 4

Brown v. *Wilemon* (C. C. A. 5th), 139 F. 2d 730, 732, describes the tribunals prescribed by Procedural Regulation 4 as "an elaborate system of quasi-courts." The characterization is an apt one. All of the incidents of a quasi-judicial proceeding, namely, written charges, the right to counsel, the provisions as to rules of evidence, subpoenas, findings of fact and of law, and appeals, are provided for.

More important, however, is the fact that the proceedings are instituted by a notice of hearing issued by the regional attorney, containing a "statement of the *charges against the respondent* and a statement of the purpose for which the hearing is to be held." (Secs. 1300.152 and 1300.153, R. 14.) The regulation provides in Sec. 1300.165 (R. 17) that if the Hearing Commissioner determines that a respondent has violated a rationing regulations or order he may issue a suspension order. A suspension order is defined in Sec. 1300.180 (f) (R. 22) as

> "an order which regulates or prohibits, for a period, the sale, transfer, delivery or other disposition or the acquisition or use of commodities or facilities, and which is issued against a person who *has acted* in vio-

lation of a rationing order or regulation." (Italics supplied.)

Rationing orders or regulations within the meaning of Procedural Regulation 4 are confined by Sec. 1300.180 (d) to those issued by the Office of Price Administration. It will be contended by the Respondents that the suspension order proceedings are a means of protecting the rationing program by allowing rationed commodities to be allocated only to the "trustworthy." It is true that past actions are one of the tests by which the future may be determined, and a survey of a person's past actions is one of the means commonly employed to determine his present character and capabilities. However, there is to be found, neither in Procedural Regulation 4 nor in any other regulation of the Office of Price Administration applicable to the situation presented by this case, any test of character, trustworthiness, or capability except violations of the orders of the Office of Price Administration alone. A felon just released from the penitentiary after serving a sentence for the worst imaginable crime is eligible to act as a dealer in fuel oil both under Procedural Regulation 4 and Ration Order No. 11. He may be known to be actively engaged in a conspiracy to violate Ration Order No. 11, but Procedural Regulation 4 affords no means to prevent his continuing to deal in fuel oil until his overt acts have been committed. He may have been found to have been guilty either by a court or by an administrative tribunal of violating the priorities regulations of the War Production Board or guilty of violating any legislation or regulations for the prosecution of the war, and still be free from any suspension order proceedings under Procedural Regulation 4.

It is further to be noted that neither the Hearing Commissioner nor the Hearing Administrator is required to make any finding as to whether the violations are of the type which would be apt to recur or whether the alleged violator would be apt to continue in his violations. Under Procedural Regulation 4, an excusable minor inadvertent

infraction of the rationing regulations can be the basis of an order denying the violator food, heat, shoes, gasoline, and the right, or privilege, of dealing in any rationed commodity. Of course, it will be protested that a Hearing Commissioner probably would not visit such dire results upon an excusable minor violator. However, the inquiry here is not into the motive of a particular Hearing Commissioner or Hearing Administrator but is an examination of the powers which Procedural Regulation 4 itself sets forth.

Procedural Regulation 4 was followed in the instant case. The violations were alleged to have occurred throughout an entire heating season, namely, from November 1, 1942, to early June, 1943. The proceedings were not instituted until August 9, 1943, two months after the occurrence of the last alleged violation and nine months after the firts alleged violation. If the violations had been substantial, supportable by legal evidence and of a nature likely to recur, the logical preventative remedial procedure would have been the obtaining of an injunction authorized by the Act. No injunction was sought. No criminal proceedings were instituted. Instead, the Office of Price Administration waited until the ration year had expired, and then compiled all of its charges.

It is likewise worthy of note that no violations in the present rationing year or heating season have been claimed to exist at any stage of the proceedings. With another heating season drawing to a close, and no violations claimed, it is difficult to maintain the proposition that the order is for the prevention of future violations.

It is true that the decision of the Hearing Administrator stated (R. 50):

> "We have no way of knowing how many customers the respondent corporation can serve while at the same time faithfully observing the rationing regulations. But we do know from its clearly established violations from the very inception of fuel-oil rationing that the number it then served approached the upper limit of

its capacity since the fact is clear that it did not (whether it would not or could not) thereafter both service this number and simultaneously comply with the rationing regulations. Additional customers, then, clearly impose a burden which the respondent cannot bear."

When the statement above quoted and the suspension order are compared in the light of admitted facts, it will be readily seen that the order was not a mere attempt to fix the amount of business which the Petitioner could serve and at the same time faithfully observe the rationing regulations. Had that been the purpose of the order, the order would simply have provided that the Petitioner should sell only the amount of fuel oil it sold during the pre-rationing year. It is believed the Respondents will concede that the order leaves to the Petitioner neither the number of customers nor the gallonage which the Petitioner enjoyed in the pre-rationing year. It is believed it will be admitted that the turnover of customers will preclude that possibility. It is believed it will be admitted that a great number of the cash customers of the pre-rationing year will be lost. The order, therefore, cannot be construed as an attempt merely to limit the Petitioner's business to that which it can properly handle and at the same time comply with the rationing regulations. Likewise it would be difficult to connect sales to the Government with wrongdoing or to characterize such sales as a danger to the rationing program. The order is mere punishment for violations which an administrative officer presumably believed to have occurred.

The Characteristics of Suspension Orders Prescribed by Procedural Regulation 4 and Here Applied are Sufficiently Penal that Statutory Authority to Issue Them Must Clearly Appear.

"Personal disabilities imposed by the law of a State, as an incident or consequence of a judicial sentence or decree, by way of punishment of an offender, and not for the benefit of any other person (private suitor)—such as attainder,

or infamy, or *incompetency of a convict to testify,* or *disqualification of the guilty party to a cause of divorce for adultery to marry again,* are doubtless strictly *penal,* and therefore have no extra-territorial operation." *Huntington* v. *Attrill,* 146 U. S. 657, 673 (italics and matter in parentheses supplied). The parallel between the disqualification of convicts to testify, prohibiting an adulterer to remarry, and a suspension order of the type here in question is obvious. All are for the protection of the public at large. None is for the benefit of a private individual. All involve personal disabilities. Yet *Huntington* v. *Attrill* recognizes that statutes providing disabilities much less penal in nature are to be strictly construed.

Brown v. *Wilemon,* 139 F. (2d) 730, 732, attempts to distinguish a suspension order from a penalty by saying:

> "Punishment or penalty in America consists in taking life, liberty, or property. A suspension order takes neither. The dealer's personal liberty is untouched. Nothing that is really his is taken from him. His filling station is unmolested and may be used to sell things other than gasolene, and to service cars. Even his gasolene is not taken from him. He is prohibited for a brief period from distributing it or from getting any more. There is damage by the interruption of his business, but damnum absque injuria. His private interest has merely come into collision with a public interest, and has had to yield."

This statement is strikingly similar to the contention made by the Attorney General in *Cummings* v. *Missouri,* 4 Wall. 277, at 320. There the Court said:

> "The disabilities created by the constitution of Missouri must be regarded as penalties—they constitute punishment. We do not agree with the counsel of Missouri that 'to punish one is to deprive him of life, liberty, or property, and that to take from him anything less than these is no punishment at all.' The learned counsel does not use these terms—life, liberty, and property—as comprehending every right known to the law. He does not include under liberty freedom from

outrage on the feelings as well as restraints on the person. He does not include under property those estates which one may acquire in professions, though they are often the source of the highest emoluments and honors. *The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact.*" (Italics supplied.)

This Court further said at 321-322:

"The theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to every one, and that in the protection of these rights all are equal before the law. *Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined.*" (Italics supplied.)

The Respondents seek to limit the effect of *Cummings* v. *Missouri* by referring to the statement in *Hawker* v. *New York*, 170 U. S. 189, 198, to the effect that *Cummings* v. *Missouri*, and *Ex parte Garland*, 4 Wall. 333, merely hold that many of the matters provided for in the oaths had no relation to the fitness or qualification of a priest or attorney. In the first place, this attempt at limiting the effect of *Cummings* v. *Missouri* and *Ex parte Garland* was not done by unanimous agreement of the Court. It was dissented to by three judges at Page 203. Moreover, as demonstrated, *supra*, the question in *Hawker* v. *New York* was whether there was additional *criminal* punishment. That this Court in *Hawker* v. *New York* recognized that disqualification from a profession is penal though not *criminal* punishment, even where the misconduct does relate to the offender's professional qualifications, is demonstrated by its citation of *Ex parte Wall*, 107 U. S. 265. It is plain from *Ex parte Wall* that while disbarment is not a criminal proceeding, requiring criminal prosecution, the disbarment for

misconduct is nonetheless penal in nature. In that case at Page 273 this Court cites with approval the following language from Archbold's Practice:

> "The court will, in general, interfere in this summary way to *strike an attorney* off the roll, *or otherwise punish him* for gross misconduct, not only in cases where the misconduct has arisen in the course of a suit, or other regular and ordinary business of an attorney, but where it has arisen in any other matter so connected with his professional character as to afford a fair presumption that he was employed in or intrusted with it in consequence of that character." (Italics supplied.)

The disbarment of an attorney has been characterized by this Court in *Helvering* v. *Mitchell*, 303 U. S. 391, 399, as a remedial *sanction*. There this Court, in describing the various types of remedial sanctions, states that one which is characteristically free of the punitive *criminal* element is revocation of a privilege voluntarily granted. Suspension orders, although not criminal punishment, fall within the classification of remedial sanctions. Any sanction, however, is penal by the very definition of the term.

This Court has held much less drastic consequences than the suspension of the right to do business as penal. Thus, in *Champlain Ref. Co.* v. *Corporation Commission*, 286 U. S. 210, 240, it was held that a provision in a statute prohibiting the production of petroleum under wasteful conditions, and providing that where violations occurred the offenders' producing property should be placed in the hands of a receiver to operate the wells and market the product, was highly penal. It was contended there by the State that liability to receivership could be extended to violations of regulations of an administrative commission. In answer to that contention this Court said:

> "* * * The language (of the statute) used applies to violations of the Act and does not extend to violations of orders of the Commission. It is plain and leaves no room for construction. *A direct and unambiguous expression would be required to warrant an*

inference that the State Legislature intended to authorize the seizure of producers' wells and the sale of their oil for a mere violation of an order.

"The context and language used unmistakably show that the section imposes a penalty and is not a measure in the nature of, or an aid of remedy by, injunction to prevent future violations * * *" (Italics and matter in parentheses supplied.)

If putting an offender's oil well in the hands of a receiver so that it might be properly operated is penal, how much more so is an order, based solely on past violations, which completely prohibits the use and operation of a violator's facilities.

The question as to whether a suspension order issued for past violations is sufficiently penal that authority therefor will not be implied is completely answered by the decision of this Court in *Wallace* v. *Cutten*, 298 U. S. 229, 236. There this Court held that the Commodities Exchange Act was remedial, not punitive, and therefore, could not be construed to extend an authority to suspend for present violations to an authority to suspend for past violations. See also *United States ex rel. Daly* v. *Macfarland*, 28 App. D. C. 552.

Moreover, Congress itself has recognized that the stoppage of the supply of rationed commodities brought about as a result of the violation of rationing orders or regulations issued pursuant to the statute in question is a penalty. When the Federal Reports Act of 1942, act of December 24, 1942, c. 811 (56 Stat. 1078) U. S. C. A. Title 5, Sec. 139 f), was before the House of Representatives, Section 8 did not appear in the bill as introduced or as reported by the committee. Congressman Smith of Virginia offered from the floor an amendment which, after several changes, became Section 8.[2] The amendment offered by him read as follows:

"Any person failing to furnish information required by any such agency shall be subject to such penalties as are specifically prescribed by law and no other penalty shall be imposed, either by way of fine, or imprison-

[2] Congressional Record, Volume 88, Part 7, Page 9164.

ment, or by the withdrawal or denial of any right, privilege, priority, allotment, or immunity, afforded to any other person."

In offering the amendment, Congressman Smith explained:

"* * * It does seem to me, in fairness to our citizens, that we should put a limitation on the right of these agencies to prescribe particular *criminal penalties or penalties of any kind,* outside of those prescribed by the Congress, for the violation or for the failure to file replies to these questionnaires. For instance, we see in the papers that Mr. Henderson is going to take the gasoline away from us if we happen to get caught driving over 35 miles an hour. (Italics supplied.)

* * * * * * * * *

"The same thing pertains to whether you shall have any oil to heat your home this winter. They send you a questionnaire * * *. If you do not happen to do that or if you do not do it right, what can that agency do to you by way of penalty? I want to fix it in this law so that they cannot do anything to me except what the law prescribes."

That the author of the amendment had in mind the revocation of privileges is further manifested when he made the following response to a question:

"Yes, but then they take away certain privileges, and you may lose your priorities or your right to buy some gasoline or an automobile or some tires. *That is what I am trying to get at.*" (Italics supplied.)

The amendment, as introduced by Congressman Smith was carried in the House. It was amended in conference to the language now appearing in the statute as follows:

"Any person failing to furnish information required by any such agency shall be subject to such penalties as are specifically prescribed by law and no other penalty shall be imposed either by way of fine or imprisonment or by the withdrawal or denial of any right, privilege, priority, allotment, or immunity, except when the

right, privilege, priority, allotment, or immunity, is legally conditioned on facts which would be revealed by the information requested."

When the Conference Report was read in the House,[3] Congressman Smith immediately inquired as to whether the conference amendments changed the meaning of the amendment offered by him. He was assured that the conference amendments merely were for the purpose of clarification in order that the Government might refuse to issue or allot rationed products, when the issuance depended upon the answers to questions which the applicant refused to give. Immediately, however, Congressman Hoffman described his understanding of what the Office of Price Administration was then doing. He said:

"• • • Take this matter of fuel oil. The citizen is asked in the questionnaire how many gallons he burns for example, over a certain period. He does not know. The farmer is asked, when he applies for gasoline for his truck, or in order to get tires, how many miles his truck traveled over a certain period. He does not know. Now, unable to answer, or answering falsely, he is liable to a penalty of $10,000, or 5 years. That ought to be enough; but, in addition to that, if he does not answer even though he cannot, he can be denied fuel oil for his house; he can be denied gasoline for his truck. So they can put into these questionnaires as many questions as they wish, subject only to the supervision of the Director of the Budget, if this bill goes through.

"I do not want to go on record as approving any such practice because when we give a department authority to issue these questionnaires they go on indefinitely with questions and then deny the man his fuel, his sugar, his tires because he cannot tell them how old Ann is or why George did not do something. I do not want to go on record as sanctioning anything of that kind."

In response, the Manager on the part of the House, Congressman Whittington, replied:

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[3] Congressional Record, Volume 88, Part 7, Pages 9434 et seq.

"I will say in response to the gentleman's statement that to effectuate the gentleman's purpose and to carry out his intention I believe the best thing the Congress can do is to adopt this report."

With these assurances given, the conference amendment was adopted. Congress, therefore, has clearly understood that suspension orders, based on previous violations, are penalties. In employing the language:

"and no other penalty shall be imposed either by way of fine or imprisonment *or by withdrawal or denial of any right, privilege, priority, allotment*, or immunity . . ."

it plainly stamped suspension orders as penal.

III.

Dealers in Rationed Commodities Are Not "Agents", "Licensees", or "Quasi-Licensees". The Penal Characteristics of Suspension Orders and the Consequences of These Characteristics Are Not Avoided by Giving Dealers Such Designations: and Even if Dealers Might Properly be Termed "Agents" or "Licensees" Authority to Terminate Their Rights by Way of Punishment for Past Misdeeds is not Given.

At the outset of this portion of the argument, issue must be taken with the statements on Page 10 of the Memorandum for the United States on the Petition for Certiorari, summarizing Petitioner's position. Petitioner does not and has not contended that the power in question is one of "license" or else a "penalty." Petitioner does note the fact that most of the decisions upholding the authority of the Office of Price Administration do so on a theory that dealers are either licensees or agents and contends that the reasoning which adopts that theory is fallacious.

The Memorandum for the United States at Page 10 makes the statement that neither the District Court nor the Court of Appeals had indicated in this case that any license to do

business or governmental power to buy and sell forms the foundation for the suspension order. The Petition for Certiorari made no claim that either of the lower Courts in this case expressly expounded any such theory. The Petition for Certiorari did, however, on Page 12, cite the opinion of the District Court as authority for the statement on the same page of the Petition that "They (the Courts upholding suspension orders) urge that a dealer is an 'agent' or 'licensee' whose agency or license may be revoked for violation." This citation was amply justified. Mr. Justice Bailey stated (R. 61):

> "* * * If the *agency* which the O.P.A. may authorize to distribute the materials or facilities misuses its authority and privileges and violates the regulations promulgated for its guidance and control, I see no reason why the O. P. A. should not revoke the allocations to and powers of the *agency*." (Italics supplied.)

Likewise, Mr. Justice Bailey, without repeating the decision in *Brown* v. *Wilemon, supra,* adopted its reasoning. He said (R. 61):

> "I agree in general with the reasoning of the Circuit Court of Appeals of the Fifth Circuit in its opinion recently handed down in the case of Brown, Admr. v. Wilemon (Williams) et al."

The theory that suspension orders could be upheld by terming dealers as "agents" of the Office of Price Administration, was not the result of unsuggested original reasoning on the part either of the District Court here or of the Circuit Court of Appeals of the Fifth Circuit in *Brown* v. *Wilemon.* On Pages 18-20 of the brief submitted for the Administrator in *Brown* v. *Wilemon,* is found an explanation of the allocation plan adopted by the Office of Price Administration. The explanation is too long for repetition here. However, it is worthy of note that the following statement is there made:

> "* * * To achieve these results the Administrator might have established a new method of distributing

vital shortage commodities, *for example, through Government outlets.* This would have enabled him to maintain rigid control over the flow of such products as gasoline and to avoid diversion of these goods in the process of distribution to the consumer. It is true that if the Administrator had set up his own distribution system independent dealers doing business in rationed products would have found themselves without their peacetime livelihoods. That would not have been an unusual effect of war since a substantial share of our men have long since abandoned peacetime pursuits and profits. The Administrator has found, however, that a less drastic change in ordinary marketing is consistent with equitable allocation. He has authorized use of existing distribution channels but has imposed a system of control to prevent waste, diversion, and injustice. The plan adopted permits all trustworthy persons to deal in rationed goods. It further assumes, as an initial matter, that all persons are trustworthy and will carry out their duties in a zealous and diligent fashion. But the Administrator is keenly aware of his role as trustee for the public of critical shortage commodities and of his duty to assure every consumer of his just share of these goods. Therefore, *the plan adopted permits dealers to act as distributing agents for the Administrator* only so long as they continue to meet the conditions of eligibility set up in the initial allocation. This means that when the Administrator determines that a person does not meet the conditions of trustworthiness and responsibility essential for the preservation of the public welfare he may allocate away from that distributor, or in other words reallocate to others who are more likely to see that the flow to consumers is not diverted * * *." (Italics supplied.)

Again on Page 29 of the same brief the following appears:

"* * * Likewise, at the retail level a similar power must be implied to eliminate certain persons *as agents for the Government in delivering scarce goods to the consumers.* There is nothing novel about an implied grant of power in such circumstances. *It is much the same as an implication of power to revoke a license,*

> and, in addition, is supported by the rule of construction that the effectuation of a granted power may necessitate the implication of authority. * * * (Italics supplied)

The brief submitted in *Brown* v. *Wilemon* was submitted to the District Court by the Respondents in this case as a portion of their Memorandum. Moreover, in the Court of Appeals the identical language appears on Pages 12-13 and Page 14a of the Respondent's typewritten brief.

The Office of Price Administration has pitched its claim of power on the theory of agency not only before the Courts but before Congressional committees and before the public. The Second Intermediate Report of the Select Committee to Investigate Executive Agencies, H. Rep. 862, 78th Cong., 1st Sess., termed suspension orders as penalties and sharply criticized their use. The Office of Price Administration prepared a written statement in answer to the Committee, which was not only used before the Committee, but was widely publicized by the Office of Price Administration. As part of its answer to the Committee's charge on Page 13 of the Committee report that "there is no statutory basis for the issuance of suspension orders against violators of rationing regulations," there appears on page 21 of the Statement of the Office of Price Administration, the following:

> "The validity of the Administrator's position becomes even more evident when it is recognized that, in a practical sense, the effect of setting up a rationing system is to make private dealers the agents of the Government for the distribution of rationed commodities."

The employment of a theory that an agency or license is involved was not a gratuitous argument. Although fallacious, it was necessary. To attempt to answer the question involved in this case merely by a statement that "the power to allocate includes the power to reallocate or put an end to the allocation" would be a vain gesture. Admittedly, the

power to reallocate or to put an end to an allocation is included in the power to allocate. This does not mean, however, that the power either to allocate, reallocate, or to put an end to an allocation is without limit. The power to allocate given by the statute is broad and properly should be construed to make effective the purpose of Congress. Confessedly, the President and his delegates must determine the classes of persons and uses whose needs are the greatest, and the President and his delegates are the sole judges as to which uses are more essential to the national defense. On the other hand, however, no Court would say that the President is authorized to allocate only to those who support his party policies, or to put an end to an allocation merely because the recipient is of the colored race, or to reallocate only to those who are his personal friends. The power does have limits. The question here is whether the admittedly broad powers of allocation can be used as a means of punishment of the offender when Congress has plainly indicated other penal and remedial measures.

Because of the fact that the powers granted by the Act are not without limits, and because of the fact that penal authority will not be implied, it is necessary to find a method of reasoning which will remove the odium of penalties from suspension orders. The theory of licensing and of agency appears at first blush to accomplish this end.

It is notable that none of the decisions characterizing a dealer as an agent or licensee cite authority for their designation. The Act itself makes no mention of the licensing power. Neither does it refer to any agency. These decisions generally cite two reasons for their conclusions. The first is that the legislation was enacted during wartime and must be broadly construed. See *Perkins* v. *Brown*, 53 F. Supp., 176, 179. The other reason is an allegation that the Government has the power to buy and sell and that if, instead of so doing or setting up its own buying and selling agencies, it chose to allow dealers to remain in business, the dealers' activities became a privilege which could be

withdrawn as to any one dealer when the Executive was satisfied that that dealer was an offender.

The proposition that the Act can be loosely construed is denied by its history. The Act of June 28, 1940 (54 Stat. 676) had been administered for ten months before the Priorities and Allocations Act of 1941 (55 Stat. 236) was introduced. The language of the Priorities and Allocations Act was suggested by the Office of Production Management which had been administering the prior act. See Hearings, House Committee on Naval Affairs, April 28, 1941, on H. R. 4534, Pages 990 *et seq.* The language suggested was practical with that of the Priorities and Allocations Act as it passed Congress. In none of the hearings and reports is there any mention of a licensing power or agency.[4]

The Priorities and Allocations Act of 1941 had in turn been administered for more than six months before the Second War Powers Act was introduced. The language of the allocation sentence was practically unchanged; but criminal and civil proceedings were requested by the Attorney General and provided in the Act. Title III of the Second War Powers Act cannot, therefore, be characterized as hasty wartime legislation. It must be concluded that the licensing power was neither requested nor given.

The proposition that the Act cannot be loosely construed to give a licensing power and that the licensing power was not given is fortified when it is remembered that even in emergencies Congress has been aware of the utility of this power. In Section 5 of the Lever Act, Act of August 10, 1917, c. 53 (40 Stat. 276), Congress expressly gave the President the power to license the dealing in necessaries. Further, in the Emergency Price Control Act of 1942 which was before Congress at the same period of the present emergency as was the Second War Powers Act, Congress

[4] Hearing on H. R. 4534 before House Committee on Naval Affairs, April 28, 1941; House Report No. 460, 77th Cong., 1st Sess.; Hearings, Senate Committee on Military Affairs on H. R. 4534, May 14, 1941; Senate Report No. 309, 77th Cong., 1st Sess.

gave the licensing power to the Office of Price Administration. The history of the Emergency Price Control Act shows that the then Administrator and the then General Counsel of the Office of Price Administration recognized not only the utility of the licensing power but the necessity of express provision for it in the statute. They recommended a licensing power before the House Committee on Banking and Currency. When the bill as it passed the House was silent as to licensing, they appeared before the Senate Committee on Banking and Currency and urged that the licensing power be included. The Act, as passed, does include the licensing power; but the revocation of license is surrounded by safeguards, and is reserved to the courts.

Neither is there any warrant for the implication of an agency. In the argument of the Respondents in their brief in the Court of Appeals here and the argument of the Administrator in his brief in *Brown v. Wilemon*, *supra*, quoted *supra*, 28-29, the theory of agency is based upon an assumption that "to achieve these results the Administrator might have established a new method of distributing vital shortage commodities, for example, through Government outlets." If this were done, the Government would be in the business of buying and selling commodities, as are dealers. Had the Office of Price Administration attempted any such method it would have run afoul not only of the statute in question but of Article IV, Section 3 of the Constitution. At the time the Emergency Price Control Act of 1942 was before the Senate Committee on Banking and Currency, the General Counsel of the Office of Price Administration filed a brief with the Committee, in which several pages were devoted to the proposition that the power to buy and sell must be expressly given, and demonstrated that previous legislation failed to give that power. See Hearings, Senate Committee on Banking and Currency, 77th Cong., 1st Sess. on H. R. 5990, at pages 239, 242, *et seq.* The Senate Committee Report, No. 931, 77th Cong., 2d Sess., likewise recog-

nized that the power to sell must be expressly given. There the statement is made that:

> "* * * The power to sell Government property is limited under the Constitution, and must be expressly granted by Congress (art. 4, sec. 3). Accordingly, before buying and selling can be undertaken by a Governmental agency, specific and clear-cut authority must be found, particularly as to the power to sell below the purchase price."

In the Emergency Price Control Act the power to buy and sell was given in Section 2. However, the power was sharply circumscribed by Section 2 (h) reading as follows:

> "The powers granted in this section shall not be used or made to operate to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry, except to prevent circumvention or evasion of any regulation, order, price schedule, or requirement under *this Act*." (Italics supplied)

Dealers are in the business of buying and selling. The suspension order here in question prohibits delivery of fuel oil to the Petitioner for resale or transfer. If a dealer is an agent, the subject of the agency must be buying and selling, and he must be performing the act of buying and selling on behalf of his principal. When an alleged principal has no authority to buy or sell, there is no agency.

The Respondents now attempt to avoid the effects of proof that there is no agency by stating that "it matters little to the position of the Government whether dealing in rationed commodities be termed a privilege or a conditional right." See Memorandum for the United States on Petition for Writ of Certiorari at Page 11. However, this refusal to name the status of a dealer does not aid the Respondents' position. Where Congress has expressly utilized licenses in other statutes, as above demonstrated, and failed to utilize here, and presumably purposely failed to utilize the licensing power, it would be a plain perversion

to bring about the same effect by exercising the rights of the grantor of a license and call the operation some other name.

It is true that there are other revocable powers or privileges than those of a license, and the revocation of a privilege voluntarily granted may be free from a punitive *criminal* element. Examples of these are set forth in *Helvering v. Mitchell, supra,* at page 399. However, in every case which has come to Counsel's attention, whatever the privilege may have been called, Congress has expressly provided the means of revocation.

Moreover, regardless of the terminology to be applied to the right to do business, the statutes giving the right to suspend the doing of business are to be strictly construed. *Wallace* v. *Cutten,* 298 U. S. 229; *United States ex rel. Daly* v. *Macfarland,* 28 App. D. C. 552. Even where the power to suspend or limit is plain the question remains whether it "has been exercised as a means for the infliction of punishment." *Ex Parte Garland,* 4 Wall. 333, 380.

The importance of the fact that Congress provided for licenses and revocations in the Emergency Price Control Act, but did not do so in the Second War Powers Act, cannot be too strongly stressed. To hold that the power to license and revoke licenses is vested in the Executive under Title III of the Second War Powers Act, not only can, but has, resulted in a perversion of the congressional intent which has already been noticed by Congress. On November 15, 1943, the House of Representatives Select Committee to Investigate Executive Agencies issued a report,[5] which disclosed that instead of bringing revocation proceedings in the courts for price violations, the Office of Price Administration adopted the device of inserting in their ration rules and regulations provisions prohibiting the dealers in rationed commodities from selling above the ceiling

[5] Second Intermediate Report of the Select Committee to Investigate Executive Agencies, House Report No. 862, 78th Cong., 1st Sess., Pages 18-19.

price. When such a dealer violated the ceiling price, no court proceedings were instituted against him to revoke his license under the Emergency Price Control Act, but the Office of Price Administration would issue a suspension order under Procedural Regulation 4 on the ground that the violation of a ceiling price was *ipso facto* a violation of the ration rules and regulations. As disclosed by the report, during a five-month period, 392 suspension orders were issued based solely on price violations, while during that same period, and one month beyond, only ten license suspension proceedings had been instituted in the courts.[6]

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[6] In the Petition for Certiorari the statement was made at Page 19 that the Government, in *Hamner* v. *United States*, 134 F. 2d 592, 594 (C. C. A. 5th), argued "that the rationing regulations created an offense by imposing as a penalty on violators an inability to get more tires." The quotation was taken directly from the opinion. Since the granting of the Petition for Certiorari, the Office of Price Administration has made available to counsel for the Petitioner a copy of the Government's brief in *Hamner* v. *United States*. It appears that the argument was not made by the Government, but that the brief merely recited a portion of the District Court's opinion, which did make the argument. Therefore, this brief does not attempt to tax the executive branch of the Government with having made it.

Ordinarily, one should be able safely to rely on the recitals of contentions set forth in opinions. However, in that case, as in this, it seemingly would be unsafe to do so. Although no constitutional contention was raised in the District Court in the instant case, it would appear from a reading of the opinion (R. 61) that the constitutional issue had been raised. In their brief in the Court of Appeals, counsel attempted to make it clear beyond the possibility of a doubt that the question of constitutional power to delegate was not in issue, and stated that the Petitioner conceded that Congress could have granted authority to issue suspension orders had it desired so to do. At the outset of the oral argument in the Court of Appeals the statement was repeated that no question was raised as to the power of Congress to delegate authority to issue suspension orders. Despite these precautions, it would appear from the opinion in *The Country Garden Market, Inc.* v. *Bowles, et al.*, ... F. 2d ...., ... U. S. App. D. C. ...., No. 8693, decided March 6, 1944, that the point "that the powers delegated to the Office of Price Administration constitute an unconstitutional delegation of legislative power" was decided adversely in this case.

IV.

Congress Did Not Ratify a Practice of Issuing Suspension Orders.

The theory of congressional ratification of an administrative interpretation was rejected in *B. Simon Hardware Co.* v. *Nelson*, 52 F. Supp. 474. The Court of Appeals in the instant case states that the practice of issuing such orders was brought to the attention of Congress when the Second War Powers Act was under consideration. Even the Respondents did not make so strong a statement in their brief in the Court of Appeals. It is true that the Attorney General and the General Counsel for the Office of Price Administration both said that the penalty of withdrawing priorities *could* be invoked, but neither of them said that such a penalty *had* been invoked. The Attorney General did infer that administrative penalties were invoked in the last war, but as above shown, *supra*, the Lever Act contained the licensing power and gave to the Government the right to buy and sell fuel. It is to be noted that the Attorney General did not refer to suspension orders; and most certainly he did not refer to suspension orders based on past conduct alone. Instead he used the present tense, "violating."[7] However, even by giving to the re-

[7] The Attorney General filed a statement with both the Senate and House Judiciary Committees setting forth the purpose and necessity of the Second War Powers Act. The pertinent portion of his statement with respect to Title III reads:

> "Investigations conducted by the Priorities Division of the Office of Production Management indicate violations of priorities and allocations orders are widespread and serious. It is true that there are various administrative sanctions available to the Office of Production Management. Fuel and power might be cut off to a factory violating the priorities order as was done during the World War on several occasions. But administrative sanctions, although highly important, do not provide an adequate remedy in all cases. For example at a time when airplane production is vitally needed, it would not facilitate war production to curtail the supply of aluminum to an airplane company and thus close the plant.

marks of the Attorney General the broadest implications, a ratification cannot be spelled out. There is no showing of ambiguity in the statute itself. The interpretation was not of long standing. See *Iselin* v. *United States*, 270 U. S. 245, 251. Neither can an interpretation supply omissions in the statute. *Wallace* v. *Cutten*, 298 U. S. 229, 237. See *United States* v. *Weitzel*, 246 U. S. 533, 542-543.

CONCLUSION.

It is respectfully submitted that this Court will find upon comparing the powers assumed by Procedural Regulation 4 with those granted by Title III of the Second War Powers Act that the admonition set forth in *Palmer* v. *Massachusetts* and quoted *supra*, 11, has not been heeded. The attempted interpretation of the statute by the Office of Price Administration has become creation, with the result that Procedural Regulation 4 is legislation itself. The result has been, not only in the instant case but in numberless others, that an alleged offender against the regulations has been tried, found guilty, and punished by an administrative court which Congress has not created and subjected to penalties which Congress has not imposed.

The attempted justification is a recital of the offenses alleged to have been committed, of which an administrative officer was satisfied. In an inquiry as to the validity of the entire proceedings for the Office of Price Administration, this Court is asked to consider the administrative officer's findings as having the verity of a court judgment or an expressly authorized administrative finding. In the instant case this verity is sought even though it appears from the

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"The civil and criminal remedies provided are intended to supply the means whereby priorities orders and allocations can be enforced when administrative sanction are not appropriate."

See Hearings before the Committee on the Judiciary, House of Representatives, 77th Cong., 2d Sess., on S. 2208, January 30 and February 2, 1942.

record that the administrative officers differed. It is obvious from the pleadings that the truth or falsity of the findings is not in issue. Petitioner does not attempt to warp an inquiry as to the authorization for the proceedings into a proceeding to disprove the facts found at the termination of those proceedings. If the proceedings were unauthorized, the factual determination resulting therefrom was of no more consequence than a conclusion of any private citizen. On the other hand, to cite the conclusions arrived at by the Hearing Administrator as a basis of determining their verity is to beg the question.

All that is sought by the Petitioner in this case is the right to defend the charges against it by the means which Congress has prescribed in the Statute; that is, either before a jury in a criminal case or before a judge in an injunction proceedings, by a tribunal that is not simultaneously judge and prosecutor and employing the legal rules of evidence.

The Office of Price Administration has usurped a power which was not given, as a result of which the Petitioner will suffer a punishment not authorized, and on evidence which the Office of Price Administration has not desired to submit to a court. The decision of the Courts below, therefore, should be reversed.

Respectfully submitted,

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APPENDIX.

Title III, Second War Powers Act of 1942 (56 Stat. 176), U. S. C. A., Title 50, App., Sec. 633.

TITLE III—PRIORITIES POWERS.

SEC. 301. Subsection (a) of section 2 of the Act of June 28, 1940 (54 Stat. 676), entitled "An Act to expedite national defense, and for other purposes", as amended by the Act of May 31, 1941 (Public Law Numbered 89, Seventy-seventh Congress), is hereby amended to read as follows:

"SEC. 2. (a) (1) That whenever deemed by the President of the United States to be in the best interests of the national defense during the national emergency declared by the President on September 8, 1939, to exist, the Secretary of the Navy is hereby authorized to negotiate contracts for the acquisition, construction, repair, or alteration of complete naval vessels or aircraft, or any portion thereof, including plans, spare parts, and equipment therefor, that have been or may be authorized, and also for machine tools and other similar equipment, with or without advertising or competitive bidding upon determination that the price is fair and reasonable. Deliveries of material under all orders placed pursuant to the authority of this paragraph and all other naval contracts or orders and deliveries of material under all Army contracts or orders shall, in the discretion of the President, take priority over all deliveries for private account or for export: *Provided*, That the Secretary of the Navy shall report every three months to the Congress the contracts entered into under the authority of this paragraph: *Provided further*, That contracts negotiated pursuant to the provisions of this paragraph shall not be deemed to be contracts for the purchase of such materials, supplies, articles, or equipment as may usually be bought in the open market within the meaning of section 9 of the Act entitled 'An Act to provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes', approved June 30, 1936 (49 Stat. 2036; U. S. C., Supp. V, title 41, secs. 35-45): *Provided further*, That nothing herein contained shall relieve a bidder or contractor of the obligation to furnish the bonds under the requirements of the Act of August 24, 1935 (49 Stat. 793, 40 U. S. C. 270 (a) to (d)): *Provided further*, That the cost-plus-a-percentage-of-cost system of contract-

ing shall not be used under the authority granted by this paragraph to negotiate contracts; but this proviso shall not be construed to prohibit the use of the cost-plus-a-fixed-fee form of contract when such use is deemed necessary by the Secretary of the Navy: *And provided further*, That the fixed fee to be paid the contractor as a result of any contract entered into under the authority of this paragraph, or any War Department contract entered into in the form of cost-plus-a-fixed-fee, shall not exceed 7 per centum of the estimated cost of the contract (exclusive of the fee as determined by the Secretary of the Navy or the Secretary of War, as the case may be).

"(2) Deliveries of material to which priority may be assigned pursuant to paragraph (1) shall include, in addition to deliveries of material under contracts or orders of the Army or Navy, deliveries of material under—

"(A) Contracts or orders for the government of any country whose defense the President deems vital to the defense of the United States under the terms of the Act of March 11, 1941, entitled 'An Act to promote the defense of the United States';

"(B) Contracts or orders which the President shall deem necessary or appropriate to promote the defense of the United States;

"(C) Subcontracts or suborders which the President shall deem necessary or appropriate to the fulfillment of any contract or order as specified in this subsection (a).

Deliveries under any contract or order specified in this subsection (a) may be assigned priority over deliveries under any other contract or order; and the President may require acceptance of and performance under such contracts or orders in preference to other contracts or orders for the purpose of assuring such priority. Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.

"(3) The President shall be entitled to obtain such information from, require such reports and the keeping of such records by, make such inspection of the books, records, and other writings, premises or property of, any person (which, for the purpose of this subsection (a), shall include any individual, partnership, association, business trust, corporation, or any organized group of persons, whether incorporated or not), and make such investigations, as may be necessary or appropriate, in his discretion, to the enforcement or administration of the provisions of this subsection (a).

"(4) For the purpose of obtaining any information, verifying any report required, or making any investigation pursuant to paragraph (3), the President may administer oaths and affirmations, and may require by subpena or otherwise the attendance and testimony of witnesses and the production of any books or records or any other documentary or physical evidence which may be relevant to the inquiry. Such attendance and testimony of witnesses and the production of such books, records, or other documentary or physical evidence may be required at any designated place from any State, Territory, or other place subject to the jurisdiction of the United States: *Provided*, That the production of a person's books, records, or other documentary evidence shall not be required at any place other than the place where such person resides or transacts business, if, prior to the return date specified in the subpena issued with respect thereto, such person furnishes the President with a true copy of such books, records, or other documentary evidence (certified by such person under oath to be a true and correct copy) or enters into a stipulation with the President as to the information contained in such books, records, or other documentary evidence. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. No person shall be excused from attending and testifying or from producing any books, records, or other documentary evidence or certified copies thereof or physical evidence in obedience to any such subpena, or in any action or proceeding which may be instituted under this subsection (a), on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be subject to prosecution and punishment or to any penalty or forfeiture

for or on account of any transaction, matter, or thing concerning which he is compelled to testify or produce evidence, documentary or otherwise, after having claimed his privilege against self-incrimination, except that any such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying. The President shall not publish or disclose any information obtained under this paragraph which the President deems confidential or with reference to which a request for confidential treatment is made by the person furnishing such information, unless the President determines that the withholding thereof is contrary to the interest of the national defense and security; and anyone violating this provision shall be guilty of a felony and upon conviction thereof shall be fined not exceeding $1,000, or be imprisoned not exceeding two years, or both.

"(5) Any person who willfully performs any act prohibited, or willfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than one year, or both.

"(6) The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States and the courts of the Philippine Islands shall have jurisdiction of violations of this subsection (a) or any rule, regulation, or order or subpena thereunder, whether heretofore or hereafter issued, and of all civil actions under this subsection (a) to enforce any liability or duty created by, or to enjoin any violation of, this subsection (a) or any rule, regulation, order, or subpena thereunder whether heretofore or hereafter issued. Any criminal proceeding on account of any such violation may be brought in any district in which any act, failure to act, or transaction constituting the violation occurred. Any such civil action may be brought in any such district or in the district in which the defendant resides or transacts business. Process in such cases, criminal or civil may be served in any district wherein the defendant resides or transacts business or wherever the defendant may be found; and subpena for witnesses who are required to attend a court in any district in any such case may run into any other district. No costs shall be assessed

against the United States in any proceeding under this subsection (a).

"(7) No person shall be held liable for damages or penalties for any default under any contract or order which shall result directly or indirectly from compliance with this subsection (a) or any rule, regulation, or order issued thereunder, notwithstanding that any such rule, regulation, or order shall thereafter be declared by judicial or other competent authority to be invalid.

"(8) The President may exercise any power, authority, or discretion conferred on him by this subsection (a), through such department, agency, or officer of the Government as he may direct and in conformity with any rules or regulations which he may prescribe."